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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No._____

ROBERT J. STRAUSS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

FROM THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
CRIMINAL CASE

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Questions Presented for Review:

Whether a defendant in a federal criminal case must show prejudice in order to demonstrate reversible error as a result of a violation of Rule 30, Federal Rules of Criminal Procedure.

Whether a District Court in a federal criminal case may properly instruct a petit jury that a grand jury may hear evidence inadmissible before a petit jury, and that the grand jury has found probable cause to believe that the defendant has committed the crime, or crimes, charged.

Parties to the Proceeding:

The charges in this case were brought by the Department of Justice of the United States Government. Petitioner, ROBERT J. STRAUSS (STRAUSS), was the Defendant below.

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Opinion Below

The Opinion of the United States Court of Appeals, Eleventh Circuit, below (Appendix A, *infra*) is reported at 678 F.2d 886.

A jury verdict was rendered below on March 2, 1981, and judgment and commitment entered by the United States District Court for the Middle District of Florida, Tampa Division, on April 17, 1981. (Judgment and Probation/Commitment Order, Appendix B, *infra*).

Jurisdictional Statement

The Judgment of the United States Court of Appeals, Eleventh Circuit, was entered on June 11, 1982.

On July 1, 1982, a Petition for Rehearing was filed and, on August 4, 1982, an Order entered denying the Petition for Rehearing.

On Motion, on August 16, 1982, an Order was entered staying the issuance of the mandate pending the filing of a Petition for Writ of Certiorari in this Court.

The jurisdiction of this Court is invoked under 28 USC §1254(1).

Statutes and Rules Involved

18 USC §2313

> §2313. Sale or receipt of stolen vehicles. Whoever receives, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 USC §2315

> §2315. Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps. - Whoever receives, conceals, stores, barters, sells, or disposes of any goods, wares, or merchandise, securities, or money of the value of $5,000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been

stolen, unlawfully converted, or taken; or ... Shall be fined not more than $10,000 or imprisoned not more than ten years, or both....

Rule 30, Federal Rules of Criminal Procedure

Rule 30. Instructions.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Statement of the Case

On November 18, 1980, an indictment, in four (4) Counts, was returned against STRAUSS. Count I of the indictment charged STRAUSS with receiving a stolen motor home in violation of 18 USC §2313. Count II charged STRAUSS with inducing and procuring the transportation of this same motor home in violation of 18 USC §2312. Count III charged STRAUSS with receiving a stolen boat in violation of 18 USC §2315. Count IV charged STRAUSS with receiving a stolen truck in violation of 18 USC §2313. During the course of trial, the District Court announced its intention to give an instruction pertaining to the function of the grand jury. STRAUSS' request to be advised of the actual instruction to be given was denied, and STRAUSS' further request that he be permitted to object to the giving of that instruction prior to its being given, and outside the hearing of the jury, was likewise denied.

The instruction pertaining to the grand jury advised the petit jury, inter alia, that a grand jury may hear evidence inadmissible before a petit jury, and that the grand jury here had found probable cause to believe that STRAUSS had committed the crimes charged. The jury returned a verdict of not guilty as to Count II of the indictment. The jury returned verdicts of guilty as to Counts I, III, and IV of the indictment. On April 17, 1981, the District Court entered a judgment and commitment Order thereon and sentenced STRAUSS to a term of imprisonment for a period of three (3) years as to each Count, the sentences to run concurrently.

On June 11, 1982, the Eleventh Circuit Court of Appeals affirmed STRAUSS' conviction.

A Petition for Rehearing was filed on July 1, 1982, and, on August 4, 1982, the Petition was denied. Thereafter, the Eleventh Circuit granted STRAUSS' Motion for Entry of a Stay of the Mandate, pending filing of a Petition for Writ of Certiorari in this Court.

ARGUMENT

Whether a Defendant in a Federal Criminal Case Must Show Prejudice in Order to Demonstrate Reversible Error as a Result of a Violation of Rule 30, Federal Rules of Criminal Procedure.

During the course of trial, the District Court announced its intention to give an instruction pertaining to the function of the grand jury. STRAUSS' request to be advised of the actual instruction to be given was denied, and STRAUSS' further request that he be permitted to object to the giving of that instruction prior to its being given, and outside the hearing of the jury, was likewise denied. These actions by the District Court patently violated Rule 30, Fed.R.Crim.P. Although finding that this instruction was not "so exhaustive as it might have been," that it had "reservations" as to the propriety of the instruction's advice that a grand jury may hear evidence inadmissible before a petit jury, and that the grand jury had found probable cause to believe that STRAUSS had committed the charged crimes (App. A, *infra*), the Eleventh Circuit nevertheless held that "any error" in compliance with Rule 30 would not mandate reversal "absent some showing of prejudice." The Eleventh Circuit then noted that the Fifth Circuit, in *United States v. Salinas*, 601 F.2d 1279, (5th Cir. 1979), did note that there "may be some uncertainty" in the Circuit as to whether, given a violation of Rule 30, a defendant must show prejudice, or whether a court need only entertain a considerable doubt about the existence of prejudice. Notwithstanding this "ambiguity" in prior decisions of the Circuit, the Eleventh Circuit adopted the former test, requiring a showing of prejudice in order to result in reversible error. This test, with respect to a violation of Rule 30 Fed.R.Crim.P., is in direct conflict with the decisions and tests applied to the same subject by the Third Circuit, in *United States v. Schartner*, 426 F.2d 470 (3d Cir. 1970), by the Ninth Circuit, in *United States v. Hamling*, 481 F.2d 307, (9th Cir. 1973), by the Fourth Circuit, in *Lovely v. United States*, 169 F.2d 386 (4th Cir. 1948), and the

Tenth Circuit, in *Hall v. United States*, 378 F.2d 349 (10th Cir. 1967). These Circuits have held that such a violation of Rule 30 does constitute reversible error, unless it affirmatively appears from the record that the defendant was not prejudiced, and that a violation of Rule 30 mandates a reversal, even where the defendant cannot affirmatively prove prejudice. In *Hamling v. United States*, 418 U.S. 87, 41 L.Ed.2d 590, 94 S.Ct. 2887 (1974), this Court held:

> "The Court of Appeals in this case felt that the rule announced by the Third Circuit in United States v. Schartner supra, was the appropriate one for application where Rule 30 has not been complied with. *The court in Schartner held that a District Court's failure to comply with the 'out of the presence of the jury' requirement of Rule 30, upon proper request by a party, constitutes reversible error 'unless it be demonstrated on an examination of the whole record that the denial of the right did not prejudice' the defendant's case.* 426 F.2d, at 480. Applying that Rule, the Court of Appeals here concluded that there was no prejudice to any of the petitioners as a result of the District Court's failure to comply with Rule 30... This provision suggests the *soundness of an approach similar to that of the Court of Appeals here and the various other Courts of Appeals, supra, which have in some manner examined the prejudice to the defendant in deciding whether reversal is required where* there is a failure to comply with Rule 30. ... The Court of Appeals felt that it should apply the somewhat stricter test of the Schartner case, supra... *we express no view, of course, as to whether a court of appeals may follow the apparently more lenient standard of requiring the defendant to demonstrate he was prejudiced.*" (41 L.Ed.2d 590, 630-631). (Emphasis supplied).

STRAUSS submits that the more lenient standard of requiring a defendant to demonstrate that he was prejudiced as a result of a violation of Rule 30, adopted by the Eleventh Circuit here, is erroneous and must be rejected. This important question of federal law has not been, but should be, finally settled by this Court. STRAUSS submits that the standard adopted by the

Third, Fourth, Ninth, and Tenth Circuits should be adopted by this Court as the law in the Federal Courts for the reasons set forth in the preceding decisions of those circuits.

Whether a District Court in a Federal Criminal Case May Properly Instruct a Petit Jury That a Grand Jury May Hear Evidence Inadmissible Before a Petit Jury, and That The Grand Jury Has Found Probable Cause to Believe That The Defendant Has Committed the Crime, or Crimes, Charged.

During the course of trial, the District Court instructed the jury concerning the function of a grand jury (App. C, *infra*). STRAUSS was not given the opportunity of being apprised of the actual instruction to be given, or to make objection to it before it was given. This instruction advised the jury, inter alia, that a grand jury may hear evidence inadmissible before a petit jury, and that the grand jury here had found probable cause to believe that STRAUSS had committed the crimes charged. The Eleventh Circuit validated this instruction. By doing so, the Eleventh Circuit has rendered a decision in conflict with the decisions of other Federal Courts of Appeal on the same matter, specifically, the Sixth, Seventh, Eighth, and Ninth Circuit Courts of Appeal. These other circuits have specifically held that: (1) it is always improper to suggest to the jury that a defendant is guilty from the mere fact that he is being prosecuted, or that a defendant is guilty merely because he has been indicted; (2) it is highly improper to inform a petit jury that the evidence presented to it is evidence which was presented to a grand jury, and upon which a grand jury based its indictment; and (3) informing a petit jury concerning the procedures involved in getting the case before them is improper, and requires reversal. *United States ex rel Clark v. Fike*, 538 F.2d 750 (7th Cir. 1976); *United States v. Bess*, 593 F.2d 749 (6th Cir. 1979); *United States v. Lewis*, 423 F.2d 457 (8th Cir. 1970); *Weaver v. United States*, 379 F.2d 799 (8th Cir. 1967); and *United States v. Cummings*, 468 F.2d 274 (9th Cir. 1972).

The Eleventh Circuit conceded that the District Court gave a "more detailed explanation" of the function of the grand jury than was absolutely necessary. Further, it acknowledged that it had "reservations" concerning the statements that a grand jury may hear evidence inadmissible before a petit jury, and that the instant grand jury had found probable cause to believe that STRAUSS had committed the crimes charged. Nevertheless, the Eleventh Circuit found the instruction "not appropriate." Noting that that Circuit had not previously ruled on the propriety of explaining to the petit jury the role of the grand jury, the Eleventh Circuit then went on to observe that other circuits, referring to the Seventh Circuit and Tenth Circuit, had considered that matter, in the cases of *United States v. Garcia*, 562 F.2d 411 (7th Cir. 1977); *Brandon v. United States*, 431 F.2d 1391 (7th Cir. 1970); and *United States v. MacKay*, 491 F.2d 616 (10th Cir. 1973). The Eleventh Circuit then found that these "sister" circuits in these decisions had held that an explanation to a petit jury of the role of a grand jury "need not be error." While it is true that these three (3) decisions did "consider" the matter here at issue, they do not support the holding attributed to them by the Eleventh Circuit. In *United States v. Garcia, supra*, the instruction given contained several points of qualification, none of which were made by the District Court here. In *United States v. MacKay, supra*, the language of the instruction in question is not provided in the opinion, and, accordingly, the opinion there is not instructive. Finally, in *Brandom v. United States, supra*, as in *MacKay*, the actual language in question was not set forth, although the opinion does state that the trial judge correctly informed the jury as to the "limited nature" of the grand jury's role, and the fact that the return of an indictment is no evidence of guilt, factors not included in the instruction here given by the District Court. More importantly, the Eleventh Circuit's validation of the erroneous, and highly prejudicial, instruction given here is in direct conflict with the holdings of the decisions above cited, in the Sixth, Seventh, Eighth and Ninth Circuits. Advising a petit jury that another jury has heard certain evidence inad-

missible before them, had found probable cause, and had issued an indictment, most certainly would lead petit jurors to include the potential existence of incriminating, but inadmissible, evidence, and the earlier finding of probable cause as factors when deliberating on the guilt or innocence of a defendant, and is patently prejudicial to a defendant. This Court should finally settle the issue of whether such an instruction is ever appropriate, under any circumstances, and notwithstanding additional language of qualification. STRAUSS submits that the single, legally permissible, response to such an inquiry must be in the negative, and that the Court should take this opportunity to finally lay at rest this issue in the Federal Courts.

CONCLUSION

The decision of the Eleventh Circuit Court of Appeals holding that a defendant in a federal criminal case must show prejudice in order to demonstrate reversible error as a result of a violation of Rule 30, Federal Rules of Criminal Procedure, is erroneous. Further, the decision of the Eleventh Circuit Court of Appeals holding that the District Court properly instructed the jury that, inter alia, a grand jury may hear evidence inadmissible before a petit jury, and that the instant grand jury had found probable cause to believe that STRAUSS had committed the crimes charged was likewise erroneous. On these grounds, STRAUSS petitions this Court to grant this Writ of Certiorari to determine the extent of the errors, and remedy same by vacating the judgment below and remanding for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing have been sent by First Class United States Mail to Solicitor General, Department of Justice, Washington, D.C. 20530, and to Manuel Menendez, Jr., Chief Assistant United States Attorney, 410 Robert L. Timberlake Building, 500 Zack Street, Tampa, Florida 33602, this 3rd day of September, 1982, and that all parties required to be served have been served.

Paul B. Johnson, Esq.

APPENDIX A

United States v. Strauss, 678 F.2nd 886, (11th Cir. 1982)

NO. 81-5357

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ROBERT J. STRAUSS,
Defendant-Appellant.

UNITED STATES COURT OF APPEALS,
ELEVENTH CIRCUIT.

June 11, 1982.

Defendant was convicted in the United States District Court for the Middle District of Florida, Ben Krentzman, Chief Judge, of receiving in interstate commerce motor vehicles and a boat, knowing that the goods were stolen. Defendant appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) the trial court did not err in explaining to the petit jury the role of the grand jury; (2) a preponderance of the evidence established a conspiracy and authorized the introduction of statements of coconspirators; (3) a search warrant for defendant's home was properly issued; and (4) the evidence was sufficient to sustain the conviction.

Affirmed.

1. Criminal Law 790

Explanation to petit jury of role of grand jury need not be error.

2. Criminal Law 730(5)

In criminal prosecution, trial court's explanation to jury of how grand jury functions, made in response to defense counsel's improper argument to jury concerning prosecution's use of leading questions before grand jury, was not inappropriate in context of explaining that leading questions are permissible under grand jury procedures; however, court should not have told petit jury that grand jury can hear evidence inadmissible

before petit jury and, when court initially told jury that grand jury will issue indictment if it finds probable cause for violation of law, it should have immediately stated that indictment is not evidence.

3. Criminal Law 829(1)

Any error in refusing requested instructions was not prejudicial where substance of requested instructions were included in trial court's instructions.

4. Criminal Law 427(5)

If court rules on admissibility of coconspirator's statements during Government's case-in-chief, it uses substantial evidence test, but if it reconsiders its initial ruling at end of Government's case, it must use preponderance of the evidence standard in determining whether Government has established requisites for admission of statements; reconsideration is required only if defendant makes appropriate motion. Fed. Rules Evid. Rule 801(d)(2)(E), 28 U.S.C.A.

5. Criminal Law 1156(3)

Generally trial court's decision whether statement offered as evidence was made by coconspirator of defendant during course of and in furtherance of conspiracy may be overturned only if clearly erroneous, but if court errs by using inappropriate legal standard when determining the facts, the clearly erroneous test no longer applies.

6. Criminal Law 427(5)

In prosecution for receiving in interstate commerce motor vehicles and a boat, knowing that the goods were stolen, preponderance of evidence showed that defendant was engaged in conspiracy and that coconspirator's statements were thus admissible against him. Fed. Rules Evid. Rule 801(d)(2)(E), 28 U.S.C.A.

7. Searches and Seizures 3.7

Search warrant must be sufficiently precise as not to permit general search, but test is reasonableness of description, and elaborate specificity is unnecessary.

8. Searches and Seizures 3.7

Search warrant describing items sought as including "blue and white Chevrolet Motor truck with dual rear wheels," a "GMC mobile home," an 'Itasca' motor home," related registration, ownership and identification documents and markings, and other "stolen property" was sufficiently precise in description despite its failure to give identification or license plate numbers of vehicles sought.

9. Searches and Seizures 3.6(2)

For warrant to issue there must be probable cause that offense has been committed and that evidence exists at place for which warrant is sought; probable cause exists if facts within magistrate's knowledge and of which he had reasonably trustworthy information would warrant man of reasonable caution in believing that crime was committed and that evidence is at place to be searched.

10. Searches and Seizures 3.5

Magistrate's reasonable conclusion that probable cause for issuance of search warrant exists is conclusive absent arbitrariness.

11. Searches and Seizures 3.6(2)

Affidavit stating that FBI had observed stolen truck and motor home outside defendant's residence, that Government informant based his conclusions on statements by a coconspirator and that informant had been reliable in the past, established probable cause for issuance of search warrant for defendant's residence, notwithstanding unintentional misstatements in affidavit concerning certain statements incorrectly attributed to informant.

12. Criminal Law 3.6(3)

Statements of informant can be credited for purposes of issuance of search warrant only if there are shown some of the circumstances from which informant drew his conclusions and if some indicia of reliability of informant are provided.

13. Criminal Law 3.6(1)

Misstatements in affidavit supporting search warrant, if intentionally made or in reckless disregard of truth, and if material, will void the warrant.

14. Receiving Stolen Goods 8(3)

Evidence was sufficient to sustain conviction of receiving in interstate commerce motor vehicles and a boat, knowing that the goods were stolen. 18 U.S.C.A. §§ 2313, 2315.

15. Receiving Stolen Goods 4

Accepting a good and having either physical control of or apparent legal power over good is sufficient to show that individual received it and to establish offense of receiving stolen goods in interstate commerce knowing that goods were stolen and there was no requirement that defendant have apparent legal power to dispose of goods. U.S.C.A. §§ 2313, 2315.

16. Receiving Stolen Goods 8(3)

Unexplained possession of recently stolen goods would allow inference of knowledge of their character at time of receipt and sustain conviction of receiving stolen goods in interstate commerce knowing that they were stolen. 18 U.S.C.A. §§ 2313, 2315.

17. Receiving Stolen Goods 1

Within purview of offense of receiving stolen goods in interstate commerce knowing that the goods were stolen, a good that has come to rest in a state has lost its interstate character, but jury need not find that good has lost its interstate character

merely because it has reached the state where it is sold or intended to be sold so long as movement within destination state can be considered a continuation of the movement that began out of state. 18 U.S.C.A. §§ 2313, 2315.

Appeal from the United States District Court for the Middle District of Florida.

Before FAY, JOHNSON and HENDERSON, Circuit Judges.

JOHNSON, Circuit Judge:

Robert J. Strauss appeals his criminal convictions for receiving in interstate commerce motor vehicles and a boat, knowing that the goods were stolen.

I. FACTS

Daniel Ott stole a boat and trailer in his home state of Ohio.[1] He called his friend Lester King to say that he would like to bring the boat to Florida. King offered to let Ott store the boat on his property in Florida and told Ott that he could be contacted at the home of appellant Strauss, a Florida deputy sheriff whom Ott had not yet met. Ott altered the boat's identification numbers, using tools that King had given him. An associate, James Riggleman, Sr., towed the boat to Florida with a truck Ott had stolen and whose identification numbers Ott had also altered. Riggleman stopped to register the boat, trailer, and truck in Alabama while on his way south. Ott meanwhile flew to Florida, where he was picked up at an airport by Strauss' wife.

After spending several days using the boat with Strauss, King, and Strauss' friend Don Whitmer, Ott returned to Ohio. He gave Strauss permission to use the boat during his absence, although Strauss apparently never took advantage of that permission. Strauss initially stored the boat on his property. Later he, with King, moved the boat from place to place. Strauss also

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1. We recite the facts in the light most favorable to the government. See *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942); *United States v. Berry*, 5 Cir., 670 F.2d 583, at 588 n.2.

sought a buyer for the boat. At one point, thinking he had found one, he had Riggleman renew the boat's Alabama registration as preparation for a sale.[2] Strauss admitted at trial that he used the truck when Ott was not present, an admission confirmed by FBI agents who saw the truck at Strauss' home on one day and observed Strauss and King using the truck when they moved the boat.

Ott's original alteration of the boat's identification numbers proved inadequate. By his next visit, Riggleman had altered them again. King showed Ott the numbers and complimented Riggleman for his fine workmanship. Strauss was present, overheard the remarks, and shook his head.

As Strauss' relationship with Ott blossomed, he told Ott that he would like to own a motor home but that he had little money and "didn't want to have any troubles with it." Ott and his associates obtained fraudulent documentation for a motor home, stole one, and altered its identification numbers. Ott then drove the home to Florida. He showed Strauss the home's options and specifications list, which stated that the home was worth $25,000, and said that Strauss could have it for $10,000. Strauss expressed concern about using the registration documents for obtaining a loan and title and for inspection. Ott assured him that the identification number had been changed and that there would be no difficulties. Although Strauss never actually bought the home, he did use it. he also paid Riggleman about $200 for the costs of registering the home in Florida under a pseudonym. Riggleman, at Strauss' request, gave as his address on the registration form apartments that Strauss owned.[3]

Strauss next began to consider whether to develop a new business with the aid of Ott's unusual skills. He asked Ott about obtaining some construction equipment, which he would buy with money loaned by his friend Whitmer. Whitmer, according to an FBI agent, recalled having Strauss seek his opinion about

2. The boat never actually was sold.

3. On one of his trips to Florida, Riggleman drove a van Ott had stolen. he was arrested while attempting to sell the van, was bailed out—possibly by Strauss, and then stayed at Strauss' home. When Strauss' home was searched, Riggleman and his son were found cowering fully clothed in showers.

going into the construction business with "hot" equipment.[4] Before the sale was completed, Ott was indicted on an unrelated stolen property charge; on Strauss' inquiry, Ott assured him that Florida and Strauss were not mentioned in the indictment and that the construction equipment deal could go through. Despite the assurance, the deal never actually was completed.

The FBI had come to suspect Strauss of illegal activities and kept his property, as well as King's, under surveillance. Agents eventually obtained a search warrant. On searching Strauss' home they found in his bedroom Florida tags, registration, and a sales tax receipt for the motor home; 1979 and 1980 Alabama registration papers for the boat; and a portion of a broadcast sheet for a Chevrolet truck. The motor home was seized at his residence. The truck, with the remaining portion of the broadcast sheet inside, and the boat were seized on King's property.

Strauss was convicted on three counts for violations of 18 U.S.C.A. §§ 2313 & 2315 in receiving in interstate commerce the motor home, the boat, and the truck, knowing that the items were stolen. He raised several issues on appeal.

THE TRIAL COURT'S STATEMENT ON THE ROLE OF THE GRAND JURY

Strauss' counsel at trial, ignoring a warning by the court, tried to indicate to the jury that the government, by the use of leading questions during grand jury proceedings, had tried to plant in Ott's mind suitable statements about Strauss' guilt. The court then explained to the jury the role of a grand jury. It stated that a grand jury hears testimony and returns an indictment if it finds probable cause that there has been a violation of the law, that it can hear testimony that a petit jury cannot, and that leading questions are permissible in grand jury proceedings. The court also noted that a person indicted has the right to a presumption of innocence and must be proved guilty beyond a reasonable doubt. During its instructions to the jury, the court repeated its explanation, leaving out the statements that a grand jury can hear testimony that a petit jury cannot and that leading questions are permissible. It also stated that an indictment "constitutes no evidence whatever", that it is not to be con-

4. Whitmer denied making such a statement to the agent.

sidered as evidence, and that the jury should construe no statement by the judge to suggest an appropriate verdict.[5] Strauss argues that the court's statements went beyond those necessary to correct any actions by his counsel, that they would lead a jury to believe that it could not find the facts since the grand jury had already done so, and that they were not a sufficiently detailed explanation of the workings of the grand jury.

(1, 2), This Circuit has not ruled on the propriety of explaining to the petit jury the role of the grand jury. Other circuits, however, have considered the matter. In *United States v. Garcia*, 562 F.2d 411, 416-17 (1977), the Seventh Circuit discussed whether a court, while explaining to the petit jury the role of an indictment, had prejudiced the defendant by its discussion of grand jury procedure. Though questioning the advisability of telling the petit jury that a grand jury could hear evidence that a petit jury could not, the court found the explanation legally correct. It held that giving the instruction was not error. The Seventh Circuit ruled similarly in an earlier case, *Brandom v. United States*, 431 F.2d 1391, 1397 (1970), cert. denied, 400 U.S. 1022, 91 S.Ct. 586, 27 L.Ed.2d 634 & 401 U.S. 942, 91 S.Ct. 950, 28 L.Ed.2d 223 (1971), in which it approved of a district court's explanation of the limited role of a grand jury and of an indictment as a means of correcting prosecutorial misstatements concerning grand juries and indictments. Finally, the Tenth Circuit has approved of a court's statement that any indictment was merely a charge and was not evidence, despite appellants' charge that the explanation would lead the petit jury to believe that the grand jury already had convicted them. *United States v. Mackay*, 491 F.2d 616, 622 (10th Cir. 1973), cert. denied, 416 U.S. 972, 94 S.Ct. 1996, 40 L.Ed.2d 560 & 419 U.S. 1047, 95

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5. Strauss contends that when the court initially instructed the jury on the role of the grand jury it did not allow him to read and object to the instructions outside of the jury's presence. This action, he asserts, violated Fed. R. Crim. P. 30, which states that a judge should allow a party to object to an instruction outside the presence of the jury. Any error in failing to permit objection, however, would not mandate reversal absent some showing of prejudice. *United States v. Salinas*, 601 F.2d 1279, 1282-85 (5th Cir. 1979). The Court in *Salinas* did note that there may be some uncertainty in this Circuit as to whether a defendant must show prejudice or whether a court need only entertain a considerable doubt about the existence of prejudice, but it found no reason to resolve the ambiguity on the facts of the case. We also see no reason here to resolve any ambiguity. If there was any error below in failing to permit objection outside the jury's presence, we are quite certain that there was no prejudice.

S.Ct. 619, 42 L.Ed.2d 640 (1974). We agree with our sister circuits that an explanation to a petit jury of the role of a grand jury need not be error. We also find no reversible error on the particular facts of this case. Strauss never contends that the information the court provided was incorrect. The court's explanation was not so exhaustive as it might have been, but it did provide a correct and, in the context of the court's instructions to the jury taken as a whole, fair and balanced description of grand jury procedures. The court also gave a more detailed explanation than was absolutely necessary to correct Strauss' counsel's actions, but the scope of the explanation of how a grand jury functions was not inappropriate in the context of a statement that leading questions are permissible under grand jury procedure.[6]

We do, however, have reservations about two of the court's statements. We share with the court in *Garcia* a concern about telling a petit jury, as the court did in this case, that a grand jury can hear evidence inadmissible before a petit jury. We also believe that it would have been better if the trial court, when it initially told the jury that a grand jury will issue an indictment if it finds probable cause for a violation of the law, had stated that an indictment is not evidence. Through the course of evidentiary objections by counsel at trial, a jury probably will, of course, become aware that there exists potential evidence that it is not permitted to hear. And the jury must implicitly realize that someone must previously have found a reason to charge the defendant with a crime. Hearing, however, that another jury had heard certain evidence inadmissible before them, had found probable cause, and had issued an indictment, might lead petit jurors to include the potential existence of incriminating but inadmissible evidence and the earlier finding of probable cause as factors when deliberating on the guilt or innocence of a defendant. Nevertheless, in the circumstances of this case there was no reversible error. The court, as noted above, in its final instructions to the jury carefully couched its explanation with assertions that Strauss was entitled to a presumption of in-

6. The court had prepared its instructions on grand jury procedure after counsel had earlier attempted to indicate that the absence of a judge from such proceedings meant that there was no one present to determine the propriety of the questions asked. From this attempt the court might easily have thought, and from the record apparently actually did think, that it was the intent of counsel to call into question grand jury procedure generally. The scope of the instruction appears at least in part to result from this perception of counsel's intent.

nocence, that he must be found guilty beyond a reasonable doubt, that an indictment is not evidence and cannot be considered as evidence, and that no statement by the judge should be taken as suggesting an appropriate verdict. Those statements eliminated any damage done by asserting that a grand jury can hear evidence inadmissible before a petit jury and that the grand jury had found probable cause to believe that Strauss had committed the charged crimes.

III JURY INSTRUCTIONS

(3) Strauss asserts that on two counts the court erred in refusing his requested instructions[7] and that it erred in refusing his requested response to a jury question. His suggested responses would have stated that, in order to be convicted, Strauss had to know at the time he received the goods that the goods were stolen and that knowledge that the goods were stolen obtained after receiving them would be insufficient.[8]

The district court stated that an essential element of the crime was "that the defendant received the motor vehicle willfully and with knowledge that it had been stolen." When the jury inquired about whether Strauss had to know that the goods were stolen at the time he received them, the court responded by stating that the jury must find that "the defendant 'received' the items...with knowledge at the time of receipt that (they) had been stolen." Although the court may not have used the precise language Strauss sought, it need not do so in order for its instruction to be correct. *United States v. Bright*, 630 F.2d 804, 821 (5th Cir. 1980). The response to the jury's query contained the gist of the instruction Strauss proposed. It was designed to and did remedy any lack of clarity in the court's initial instruction. Strauss' argument fails.

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7. Strauss does not challenge the instruction dealing with the count on receiving the boat.

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8. The government protests that it is not clear that, for conviction, Strauss must, at the time he received the vehicles and boat, have known that they were stolen. We disagree. A reasonable reading of the statute compels the conclusion that knowledge must be present at the time of receipt. The cases of the former Fifth Circuit support that conclusion. "The Dyer Act (18 U.S.C.A.) §§ 2311 et seq.) is violated when one receives a stolen automobile with knowledge of its theft..." *Pilgrim v. United States*, 266 F.2d 486, 488 (5th Cir. 1959); see also *Odom v. United States*, 377 F.2d 853, 857 (5th Cir. 1967), cert. dismissed, 400 U.S. 23, 91 S.Ct. 112, 27 L.Ed2d 122 (1970).

IV ADMISSION OF COCONSPIRATOR' STATEMENTS

(4, 5) Strauss' next contention centers on the trial court's decision under authority of Fed.R.Evid. 801(d)(2)(E) to allow into evidence against him the statements of alleged coconspirators Ott, Riggleman and King made during the course of and in furtherance of the conspiracy. During the government's case in chief, the court ruled that the statements were admissible because substantial evidence showed the existence of the necessary predicates for admission: that the statements were made by coconspirators, that the coconspirators were part of a conspiracy to which Strauss belonged, and that the statements were made in furtherance of the conspiracy.[9] The court reconsidered its ruling at the end of the government's case in chief and again found the statements admissible because of substantial evidence showing the existence of the predicates for admission. In its latter ruling the court erred in looking only for substantial evidence, rather than for a preponderance of the evidence.[10] We nevertheless affirm its ruling since we find a preponderance of the evidence, independent of the statements sought to be in-

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9. Fed.R.Evid. 801(d)(2)(E) provides that a statement is not excludable as hearsay if made "by a coconspirator of a party during the course of and in furtherance of the conspiracy."

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10. If a court rules on the admissibility of the statements during the government's case in chief, it uses a substantial evidence test. *United States v. James*, 590 F.2d 575, 581 (5th Cir.) (en banc), cert. denied, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979). However, if the court reconsiders its initial ruling at the end of the government's case, it must use a preponderance of the evidence standard in determining whether the government has established the prerequisites for the admission of the statements. Id. at 582.
We note that the court here reconsidered its initial ruling on its own initiative. Reconsideration is required only if the defendant makes an appropriate motion. *United States v. Bulman*, 667 F.2d 1374, 1380 (11th Cir. 1982).

troduced, indicating the existence of a conspiracy to which Strauss belonged and in the furtherance of which the statements at issue were made.[11]

(6) Strauss admits that the evidence does show a conspiracy between Ott and Riggleman.[12] He asserts, however, that no evidence shows that he was part of that conspiracy. He is incorrect. Strauss knew of the boat's altered identification numbers, knew of the extraordinarily low price asked for the motor home, used and stored the stolen items, sought a buyer for the boat, paid for the registration of the motor home, and possessed some registration documents for the items. These facts quite clearly demonstrate that Strauss had knowingly entered and assisted in a conspiracy for the receipt and disposition of stolen property. Strauss also contends that King's statements were inadmissible because no independent evidence showed King's membership in a conspiracy. He again overlooks several crucial facts. King knew Ott was dealing in stolen items—he gave Ott the tools to alter the boat's identification numbers, pointed out to Ott and Strauss the fine work Riggleman had done in realtering the boat's identification numbers, and assuaged Ott's concerns about Strauss' occupation by telling him at one point "not to worry about Strauss; he didn't carry his work home with him." King also provided storage space for the stolen boat and truck and helped move the goods from place to place. These facts establish King's membership in a conspiracy dealing in stolen goods.

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11. Generally a trial court's decision whether a statement offered as evidence was made by a coconspirator of a defendant during the course of and in furtherance of a conspiracy may be overturned only if clearly erroneous. *Bulman, supra*, 667 F.2d at 1379, but if a court errs by using an inappropriate legal standard when determining the facts, the clearly erroneous test no longer applies. See *United States v. Barker*, 553 F.2d 1013, 1024 (6th Cir. 1977); *Kentucky Fried Chicken v. Diversified Packaging Corp.*, 549 F.2d 368, 384 (5th Cir. 1977) (civil case). Since the trial court here erred in using only a substantial evidence standard when admitting the coconspirators' statements, we review as a matter of law its findings on the existence of a conspiracy.

12. Strauss also never argues that the statements were not in furtherance of any conspiracy that we might find existed.

V. THE SEARCH WARRANT

Strauss raises several objections none with merit, to the search warrant that justified the search of his home.

A. Particularity of the Description of Goods

(7, 8) The court issuing the search warrant described the items sought as including a "blue and white Chevrolet Motor truck with dual rear wheels"; a "GMC mobile home", an 'Itasca' motor home"; related registration, ownership and identification documents and markings; and other "stolen property". Strauss contends that the description was not sufficiently precise because it included broad terms such as "stolen property" and did not give the identification or license plate numbers of the vehicles sought. He seeks to hold the issuing court to too strict a standard. A search warrant must indeed be sufficiently precise as not to permit a general search, but the test is the reasonableness of the description. Elaborate specificity is unnecessary. See *United States v. Osborne*, 630 F.2d 374, 378 (5th Circ. 1980); *United States v. Freeman*, 532 F.2d 1098, 1100 (7th Cir. 1976). In *Osborne*, the Court found sufficiently precise a description of items sought as a "money order machine" and "any other evidence" relating to a robbery. Given that holding, we believe the descriptions here easily were precise enough to prevent a general search.

B. Probable Cause

(9, 10) For a warrant to issue there must be probable cause that an offense has been committed and that evidence exists at the place for which a warrant is sought. *Zurcher v. Stanford Daily News*, 436 U.S. 547, 588, 98 S.Ct. 1970, 1977, 56 L.Ed2d 525 (1978). Probable cause exists if facts within the magistrate's knowledge and of which he had reasonable trustworthy information would warrant a man of reasonable caution in the belief that a crime was committed and that evidence is at the place to be searched. See, e.g., *Draper v. United States*, 358 U.S. 307, 313, 70 S.Ct. 329, 333, 3 L.Ed.2d 327 (1964); *United States v. Maestas*, 546 F.wd 1177, 1180 (5th Cir. 1977). A magistrate's reasonable conclusions that probable cause exists is, however, conclusive absent arbitrariness. *United States v. Long*, 674 F.2d

848, 852, (11th Cir. 1982); *United States v. Weinrich*, 586 F.2d 481, 487 (5th Cir. 1978), cert. denied, 441 U.S. 927, 99 S.Ct. 2041, 60 L.Ed.2d 402 (1979).

(11) Strauss makes several arguments concerning the court's findings on probable cause. He first contends that there was no probable cause to believe the items listed in the warrant were at his home. The affidavit accompanying the warrant, however, states that the FBI had observed the stolen truck and motor home at times outside his residence. On the basis of this statement the magistrate could, without arbitrariness, find probable cause that items connected with the stolen goods or the goods themselves were at the residence.

(12) Strauss next asserts that no information was presented that showed the reliability of the hearsy statements of a confidential informant.[13] The issue is raised often. Such statements can be credited only if there are shown some of the circumstances from which the informant drew his conclusions and if some indicia of the reliability of the informant are provided. E.g., *Spinelli v. United States*, 393 U.S. 410, 413, 89 S.Ct. 584, 587, 21 L.Ed.2d 637 (1969); *United States v. Flynn*, 664 F.2d 1296, 1301-07 (5th Cir. 1981); *United States v. Garner*, 581 F.2d 481, 484 (5th Cir. 1978). The affidavit supporting the request for a search warrant asserts that the informant based his conclusions on statements by Ott and that the informant had been reliable in the past. Those assertions provided a sufficient basis for crediting the informant's statements.

(13) Strauss' final argument is based on a communications difficulty among FBI agents that resulted in the inclusion in the affidavit supporting the request for a warrant of certain statements incorrectly attributed to the informant. Such misstatements in the affidavit, if intentionally made or in reckless disregard of the truth, and if material, will void the warrant. *United States v. Bradsby*, 628 F.2d 901, 904 (5th Cir. 1980); *United States v. Astroff*, 578 F.2d 133, 136 (5th Cir. 1978) (en banc). Strauss asserts that the statements were reckless or intentionally made. The trial judge, after a hearing, found otherwise. His finding is of fact. We will reverse it only if clearly erroneous. See *United States v. Llinas*, 603 F.2d 506, 508 (5th Cir.

13. We assume that each of the assertions that Strauss argues we cannot credit is necessary for a finding of probable cause.

1979), cert. denied, 444 U.S. 1079, 100 S.Ct. 1030, 62 L.Ed.2d 762 (1980); cf. *United States v. Character*, 568 F.2d 442, 445 (5th Cir. 1978) (noting "limited scope of review"). Having reviewed the record, we find that it supports the district court's conclusion.

VI. SUFFICIENCY OF THE EVIDENCE

(14) Strauss' final hope for reversal lies in our finding the evidence insufficient for his conviction. Unfortunately for him, we find it sufficient. Before we address his claims with regard to separate elements of the crimes for which Strauss was convicted, we note generally that we can find the evidence insufficient for conviction only if, looking at the evidence in the light most favorable to the government, we determine that the jury necessarily must have entertained a reasonable doubt about a defendant's guilt. E.g., *United States v. Bulman*, 667 F.2d 1374, 1377 (11th Cir. 1982).

A. Receiving Stolen Goods

Strauss admits that he at times "possessed" the goods but argues that to receive a good means not merely to possess it. Rather, he opines, he must have apparent legal power to dispose of the good. Since there is no evidence that he appeared to have such legal power, Strauss concludes that he could not be convicted for receiving stolen goods.

(15) Strauss' definition is far too limited. Sections 2313 and 2315 have identical language that punishes anyone who "receives, conceals, stores, barters, sells, or disposes of" stolen vehicles or goods conveyed through interstate commerce. The broad sweep of the sanctioned activities indicates that the Congress did not intend a limited, technical definition of the word "receive." We believe that accepting a good and having either physical control of or apparent legal power over a good is sufficient to show an individual received it. The evidence before the jury was sufficient for it to conclude beyond a reasonable doubt that Strauss had accepted the items at issue and had physical control of them.[14]

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14. The court's instruction to the jury stated that "(t)o receive a stolen motor vehicle...or a stolen boat...means to acquire in the sense of physical dominion or apparent legal power to dispose of the vehicle (or boat) and in (v)isages possession or control of the vehicle knowing the vehicle or boat to have been stolen." The instruction was a correct statement of the law.

B. Knowledge that the Goods were Stolen

(16) Strauss next contends that no evidence shows that he knew the vehicles and truck were stolen when he received them.[15] We disagree. The unexplained possession of recently stolen goods would alone allow the inference of knowledge at the time of receipt.[16] See, e.g., *Barnes v. United States*, 412 U.S. 837, 841-47, 93 S.Ct. 2357, 2360-64, 37 L.Ed.2d 380 (1973); *United States v. Lambert*, 580 F.2d 740, 743-44 (5th Cir. 1978); *United States v. Fairchild*, 505 F.2d 1378, 1381 (5th Cir. 1975).[17] More evidence than the mere possession of recently stolen goods does, in any event, exist. Strauss knew of the altered identification numbers on the boat, of the unusual manner of obtaining title for some of the items, and of the low price for the motor home. These factors, together with the complex web of other circumstantial evidence outlined in our discussion of the facts of the case, allowed the jury to conclude that Strauss knew at the time he received the vehicles and boat that they were stolen.

C. Interstate Character of Crime

(17) As Strauss notes, a good that has come to rest in a state has lost its interstate character. *United States v. Tobin*, 576 F.2d 687, 691-93 (5th Cir.), cert. denied, 439 U.S. 1051, 99 S. Ct. 731, 58 L.Ed.2d 711 (1978); *Powell v. United States*, 410 F.2d 710, 713 (5th Cir. 1969). Strauss contends that the jury could not have found that the vehicles and boat retained their interstate character. As the Court in *Tobin* noted, a jury need not find that

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15. The government might have avoided any difficulty with the definition of receive and with whether Strauss knew at the time he received the vehicles and trucks that they were stolen if it had stated in its indictment that Strauss also stored or concealed the items knowing that they were stolen, since storage also is sanctioned in 18 U.S.C.A. §§ 2313 & 2315. For some unexplained reason, it did not do so.

16. The court instructed the jury on the permissibility of this inference.

17. Strauss protests that he did present an explanation for his possession of recently stolen goods. A jury can, however, determine whether a purported explanation is credible. *Lambert, supra*, 580 F.2d at 743-44; *Fairchild, supra*, 505 F.2d at 1381. Based on the evidence presented to it, a jury could easily have determined that Strauss' explanation for his possession of the recently stolen property was not credible and therefore was entitled to no weight.

a good has lost its interstate character merely because it has reached the state where it is sold or intended to be sold so long as the movement within the destination state can be considered a continuation of the movement that began out of the state. 576 F.2d at 692; see also *Powell, supra*, 410 F.2d at 713. In this case, Strauss was involved with individuals stealing property and bringing the property to Florida for sale. Two of the items at issue, the motor home and boat, were for sale in Florida. The third item, the truck, may well have been for sale; it was at least used in transporting the boat, an item that was for sale. A jury might reasonably have concluded that the actions taken with respect to the vehicles and boat were all in continuation of their movement in interstate commerce and that therefore the items had not lost their interstate character.

We reject all Strauss' claims of error below. The judgment of the district court is AFFIRMED.

APPENDIX B

Judgment and Probation/Commitment Order by United States District Court for Middle District of Florida, Tampa Division. 4-17-81

UNITED STATES DISTRICT COURT
for Middle District of Florida — Tampa Division
Docket No. 80-137-Cr. T-K
UNITED STATES OF AMERICA,

vs.

ROBERT J. STRAUSS,
Defendant

Judgment and Probation/Commitment Order

In the presence of the attorney for the government the defendant appeared in person on this date, month 4, day 17, year 81 with counsel Paul B. Johnson.

Not Guilty

There being a verdict of Guilty.

Defendant has been convicted as charged of the offense(s) of receiving stolen motor vehicles which traveled in interstate commerce, knowing same to have been stolen; in violation of Title 18, United States Code, Sections 2313 and 2315, as charged in Counts 1, 3 and 4 of the Indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representatives for imprisonment for a period of Three (3) Years as to Count 1, Three (3) Years as to Count 3, Three (3) Years as to Count 4, or until the defendant is other wise discharged as provided by law. Sentence imposed on Counts 3 and 4 to run concurrently with sentence imposed on Count 1. In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within any maximum probation period of five (5) years permitted by law, may issue a warrant and revoke probation for a violation occurring during

the probation period. The court orders commitment to the custody of the Attorney General and recommends.
It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.
Signed by U. S. District Judge Ben Krentzman
Date April 17, 1981.

APPENDIX C

Instruction Pertaining to the Grand Jury

Ladies and gentlemen, I am going to instruct you about the law with regard to a Grand Jury.

Now, you, of course, are a trial jury; not a Grand Jury. The United States Constitution, as amended by the Bill of Rights, requires that only a Grand Jury can charge a person with a serious crime.

A Grand Jury consists of twenty-three persons called for that purpose, called by the same method as trial jurors are called, random selection. A Grand Jury serves for approximately a year and sits periodically during that time. It considers evidence and testimony from Government agents and from witnesses called to testify before it.

It decides whether there is probable cause to believe that a person has committed a criminal offense. If it does, it returns an indictment charging that offense. If not, it does not return an indictment.

If an indictment is returned, a defendant has the right to a jury trial. At a jury trial, a defendant has the presumption of innocence throughout the trial and the Government is required to prove the defendant's guilt beyond a reasonable doubt and you have been told that and you will be instructed as to what a reasonable doubt is later in these instructions.

A witness who is called and sworn before Grand Jury is required to answer truthfully questions put to the witness, unless the witness claims the right as guaranteed by the Constitution not to make a statement which the witness believes may tend to incriminate him.

A witness before the Grand Jury may leave at any time to confer with an attorney outside the room where the Grand Jury sits.

In order to protect persons who may be investigated, but not charged, witnesses and the Grand Jurors themselves, from possible prejudicial publicity, the proceedings at a Grand Jury are not public. At the time that the Grand Jury votes whether or not an Indictment will be returned, only the Grand Jurors are present.

At other times, one or more Government attorneys, a Court Reporter, and the Government agent or witness who is testifying may be present in the Grand Jury room.

All persons in the Grand Jury room except the witness are prohibited from disclosing anything that occurs at a Grand Jury session. There is no prohibition against a witness who appears before a Grand Jury thereafter discussing his or her testimony within one.

Now, that is in the Federal system. At a Grand Jury proceeding, the Government is allowed to introduce hearsay testimony. Except with some exceptions, that is not permitted at a jury trial such as this.

At a Grand Jury session, the Government attorneys may ask leading questions. They may not do that at a jury trial.

There is a considerable difference between a Grand Jury proceeding and a jury trial. Since there is this procedure before a Grand Jury, I wanted you to know what a Grand Jury is in the Federal system, how it works, and what the rules are.